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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JEREMY JOHNATHAN CARDEN, Defendant and Appellant.	G040614 (Super. Ct. No. RIF129212) O P I N I O N

Appeal from a judgment of the Superior Court of Riverside County, Roger A. Luebs, Judge. Affirmed.

Sylvia Koryn, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Lilia E. Garcia and Meagan J. Beale, Deputy Attorneys General, for Plaintiff and Respondent.

Jeremy Johnathan Carden appeals from a judgment after a jury convicted him of three counts of willful, deliberate, and premeditated attempted murder, three counts of assault with a deadly weapon, and street terrorism, and found true numerous enhancements, including that he committed attempted murder and assault with a deadly weapon for the benefit of a criminal street gang. Carden argues: (1) insufficient evidence supports his convictions for willful, deliberate, and premeditated attempted murder and street terrorism and the jury's finding on the street terrorism enhancements; (2) the trial court erroneously denied his motions for continuances and mistrial; (3) the prosecutor committed misconduct; (4) the court erroneously instructed the jury; and (5) there was cumulative error. None of his contentions have merit, and we affirm the judgment.

FACTS

On St. Patrick's Day 2006, John Rhodes, who lived with his mother, sister, and two friends, Steven Raymond and Ryan Manning, had a party. Around midnight, the three men, and Patrick Ramaker and Matt Wills were standing in front of the house.

A group of between seven and 12 Caucasian males wearing white and black bandanas over their faces and wearing sweatshirts with hoods pulled over their faces ran towards them. The mob asked them if they were "DC" and proclaimed they were "'Dub-C, mother fuckers[.]'" Wills went inside and called 911. The mob attacked Manning, Raymond, Rhodes, and Ramaker without provocation or warning.

Three to four men separated Manning from his friends and attacked him. The men knocked Manning to the ground and repeatedly hit and kicked him. Manning was stabbed twice, once in the lower back and once in his right side; he required stitches but not surgery.

When Raymond tried to assist Manning, one man attacked Raymond, but Raymond threw the man to the ground, and first two and then three men attacked him. They repeatedly punched him in the face, chest, and stomach. When the men fled,

Raymond discovered he had been stabbed, and he went inside and passed out. Raymond had been stabbed six times: twice in the chest; twice in the leg; once in his shoulder; and once in his wrist. The stab wounds were consistent with two different stabbing instruments. Paramedics transported Raymond to the hospital where he underwent emergency open heart surgery to drain the blood from around his heart and repair his life-threatening injuries.

While some of the men attacked Manning and Raymond, four men attacked Rhodes. Two men grabbed Rhodes and threw him onto a truck. They pinned him down, and two other men hit and kicked him. After the attack, Rhodes realized he had been stabbed four times: three times in his side and one time in the arm. He required stitches but not surgery.

The mob also attacked Ramaker.[1] Austin Sloan punched Ramaker and when he fell to the ground, another man kicked him. When Ramaker reminded Sloan they knew each other from high school, Sloan told his confederate Ramaker was "cool," and they called off their attack.

During the attack, a neighbor John Huggins opened his garage door because he heard a ruckus. Huggins saw men running away from the Rhodes's house and heard them yell, "[D]on't f[uck] with Dub-CK." He saw the men get into a truck (an extended cab white Chevrolet S10) and two cars (a white Toyota Celica or Honda Civic and a blue Toyota Corolla).

After the attack, Rhodes found in his front yard a letter opener with medical tape wrapped around the handle; he gave it to his mother, who gave it to police. Law enforcement could not lift fingerprints from the letter opener because of the tape. The letter opener could have caused Raymond's chest injuries.

[1] Ramaker did not want to testify because he feared for his family's safety.

Detective Rick Cobb interviewed the victims shortly after the attack. When Cobb interviewed Raymond, he identified Ryan Smith from his high school yearbook as one of the attackers. Cobb arrested Smith one week after the attack. During an interview with Cobb, Smith stated Carden stabbed all three victims. Cobb requested Officer James Bellmeyer of the United States Marshalls Regional Fugitive Task Force to apprehend Carden.

The next month, Bellmeyer and other officers conducted surveillance of Carden's last known address. Bellmeyer saw Carden leave his apartment and after briefly losing sight of him, Bellmeyer saw him driving a truck matching the description of the truck leaving the scene of the attack. Bellmeyer initiated a traffic stop and got out of his car. He drew his gun and told Carden to turn off his vehicle, get out of the car, and put his hands in the air.[2] Carden complied with the first two orders but when his hands got to his chest area, he turned and ran. After evading the fugitive task force, officers later found Carden hiding in a dumpster.

Later that day, Cobb advised Carden of his *Miranda*[3] rights and interviewed him.[4] Cobb asked Carden if he knew why Cobb was interviewing him and he said, "No." Cobb asked Carden if he heard anything about a fight in Orangecrest on St. Patrick's Day. Carden claimed he was with his girlfriend, Michelle Freeman, and another couple at his friend's house. When Cobb asked him whether he went out that evening, Carden said he did not go to any restaurants or bars. Cobb asked him whether he had been to Romano's restaurant, Carden replied, "every now and then." When Cobb said there was

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[2] Bellmeyer testified he never told Carden why he detained him.

[3] *Miranda v. Arizona* (1966) 384 U.S. 436.

[4] An audiotape of the interview was played for, and transcripts of the interview were provided to, the jury.

a fight and people were stabbed, Carden asked whether anyone had implicated him and stated he knew nothing about the attack.

Over one year later, Freeman had telephone conversations with Carden while he was in jail awaiting trial.[5] During one of the calls, Carden told her that she did not have to say anything to the prosecutor's investigator because they were going to manipulate her. Carden told her to speak only with his lawyers, but when Freeman said she had to speak with them, Carden responded, "Great, now I'm fucked." After Freeman spoke with an investigator, there was another call. Carden was upset Freeman had spoken with the investigator and said the prosecutor was going to use her statements against him. He repeated his plea to her not to speak with the investigator because they were manipulating her.

A second amended information charged Carden (and Sloan) with three counts of willful, deliberate, and premeditated attempted murder (Pen. Code, §§ 664, 187, subd. (a))[6] (count 1-Raymond; count 2-Rhodes; count 3-Manning), street terrorism (§ 186.22, subd. (a)) (count 4), and three counts of assault with a deadly weapon (§ 245, subd. (a)(1)) (count 5-Raymond; count 6-Rhodes; count 7-Manning). As to counts 1, 2, and 3, the information alleged Carden personally used a dangerous and deadly weapon, a knife (§ 12022, subd. (b)(1)). The information alleged he committed all but count 4 for the benefit of a criminal street gang (§ 186.22, subd. (b)(2)). With respect to all the counts, the information also alleged he personally inflicted great bodily injury (§ 12022.7, subd. (a)). Finally, the information alleged he served a prior prison term

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[5] Freeman, who started dating Carden after the attacks, testified generally about their relationship.

[6] All further statutory references are to the Penal Code, unless otherwise indicated.

(§ 667.5, subd. (b)). The trial court granted Carden's motion to bifurcate count 4 and the street terrorism enhancements, and the prior prison term.

Phase I

The prosecutor offered Raymond's testimony. Raymond testified Smith was one of the men who attacked him. Raymond believed two people stabbed him and Smith was one of the men.

Accomplice Testimony

At trial,[7] the prosecutor offered Smith's testimony. Smith pled guilty to one count of attempted second degree murder and two counts of felony assault. He agreed to testify against all defendants in exchange for a seven-year prison term. He pled guilty to avoid a possible life sentence. Smith testified he was at Romano's restaurant/bar drinking with his girlfriend, Abbie Zech, Bashir Rizk, Johnny Umbarger, Kyle Lovell, Sean Bessert, Michael Hudson, Austin Sloan, and Carden, among others.

Smith testified to the following: Carden told Smith, Sloan, Hudson, and Umbarger that his friend Brad McDaniel was having "problems" at a "Drunken Characters" (DC) party in Orangecrest. Sloan said, "[L]et's go." Smith went to the party because there was going to be a fight, but he did not intend to participate. He went to assist his friends if they required help. Smith drove Sloan, Hudson, and Bessert to the party in his white Honda Accord. Umbarger drove his girlfriend, Ashlee Pease, and Carden to the party in his smaller, blue two-door coupe. Kyle Rochlin got into his car and drove to the party. They parked their cars and got out. Carden, Umbarger, Sloan, Hudson, Smith, Rochlin, and Bessert spoke with McDaniel.[8] Carden saw a group of people and yelled, "That was them." Carden, Sloan, McDaniel, Umbarger, Hudson,

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[7] Carden and Sloan were tried together.

[8] Smith could not remember whether Lovell was there, but he previously told police he was there.

Bessert, and Smith ran towards three men. Carden, who was leading the charge, put a white bandana over his face, Sloan covered his head with a hood from his sweatshirt, and Umbarger covered his face with a shirt. Without provocation, Carden and his posse attacked the three men. Umbarger attacked Raymond and they exchanged punches. When Raymond began getting the better of Umbarger, Smith pushed Raymond to get him off Umbarger. Carden also hit Raymond, and soon Umbarger resumed his attack on Raymond. Carden also hit one of the other men who was lying on the ground. Sloan also appeared to be fighting someone. Eventually, the attackers fled in the cars they had arrived in. At McDaniel's house, Carden said he stabbed three or four people.

Smith stated he was not armed with a weapon and he did not see anyone with a weapon that night. He admitted making false statements to police the week after the attack. Smith testified that in the months leading up to the trial, he and Carden were on their way to a court appearance when Carden told him to "keep [his] mouth shut."

Smith also testified concerning Dub-C, a party "krew" that originated in 2000 or 2001, who called themselves "WC" or "WCK" and resided in the Woodcrest community of Riverside. He said Carden, Sloan, Umbarger, Rizk, and Hudson were all part of Dub-C. Smith demonstrated Dub-C's hand sign and was shown photographs found in his bedroom with people, including Frank Walker, "throwing" Dub-C hand signs. Smith agreed he previously told a detective Carden, Sloan, Umbarger, Rizk, and Hudson were part of Dub-C.

Corroborating Testimony

Rizk testified Carden, Sloan, Umbarger, Smith, Hudson, and Bessert were all at Romano's the night of the attack. Rizk stated at some point people asked him for a ride to a party but he did not want to leave.[9]

[9] Rizk did not want to testify because he was afraid Carden and Sloan would retaliate against him.

Rochlin testified he drove with Umbarger and Pease in Umbarger's blue, two-door, Toyota Tercel to Romano's. Rochlin denied he saw Carden or Smith there, denied telling Hector Gonzalez, a defense investigator otherwise, and denied hearing about another party or fight. Rochlin claimed they left Romano's and drove to a party, and Umbarger got out of the car and quickly got back in because police were breaking up the party or there was a fight. Rochlin said he never got out of the car and he did not see Carden or Sloan there. Gonzalez later testified that during an April 2006 interview Rochlin told him he saw Carden and Smith at Romano's.

Zech, Smith's girlfriend, testified Carden, Sloan, Umbarger, Smith, Hudson, Rizk, Pease, and Bessert were at Romano's the night of the attack. She explained Carden was on the telephone, and when the call ended, he told Smith that McDaniel told him that his girlfriend was in trouble and McDaniel wanted them to come to the party to help. Smith told Zech he was leaving to help McDaniel. When her memory was refreshed with her prior statement to Smith's attorney, she admitted telling him that at Romano's "they were going to fight somebody."

Pease testified her boyfriend, Umbarger, drove her and Rochlin to Romano's in Umbarger's blue Toyota Tercel. Like Rochlin, she did not see Carden, Sloan, or their confederates at Romano's. She explained that after they left Romano's, Umbarger received a telephone call and they went to a party. She claimed that when they got to the party, Umbarger got out of the car and quickly got back in, and they left. She saw people running towards them and thought the police had broken up the party.

The prosecutor also offered the testimony of Officer Timothy Jenkins. Jenkins testified that in July 2004, he spoke with Carden and asked him if he had any gang affiliation. Carden responded, "WCK," Woodcrest Killers. Additionally, there was evidence Carden had "WC" tattooed on his chest.

The prosecutor also offered the testimony of Detective Mike Medici, who executed a search warrant at Sloan's home a few months after the attack. Medici testified

an officer found a red baseball hat with "WC" on the outside of the hat and "WKC" written on the underside of the bill.

Defense Evidence

Carden rested on the state of the evidence and did not present any witnesses on his behalf. Sloan, however, testified. So as to not interrupt the flow of Sloan's testimony, we will present it in its entirety. But as will soon be apparent there was a procedural issue that arose during his testimony that forms the basis of two of Carden's arguments on appeal. We will provide those facts immediately after his testimony.

Sloan admitted driving his blue Chevrolet S10 truck from Romano's to the party. He claimed he was not wearing a bandana or a hooded sweatshirt, he walked alone from his truck to the party, and he did not hear anyone shout "Dub-C." He did not see anyone wearing a bandana. Sloan said he punched Ramaker because he thought he had a weapon and when he recognized him, he apologized. He stated a person wearing a bandana or hooded sweatshirt kicked Ramaker in the head and he told the person Ramaker was "cool." Sloan did not see Carden at the party, and he did not see anyone with a weapon or stab anyone. He saw Smith, Lovell, and Hudson at the party. Sloan admitted he told his mother "[Carden] wigged out and stabbed people" during the fight but not that night when he returned home—Sloan claimed he told her later based on what he heard from others. His mother testified Sloan made this statement to her later, not when he returned home from the fight. However, she admitted telling Cobb that her son made this statement when he returned home from the fight. Sloan testified he visited Smith in jail. Sloan said Smith asked him to tell the investigator Carden was wearing a white bandana and hooded sweatshirt and that Carden stabbed people. Sloan denied the red baseball hat was his.

On the morning of the 19th day of trial, a Thursday, in the middle of Sloan's testimony, Carden's defense counsel stated Carden was assaulted the previous night and had been released from the hospital that morning at 5:00 a.m. He stated Carden

was slashed on the cheek and required 12 stitches, had a few head injuries, had a puncture wound on his wrist, and had dried blood on his body. Counsel requested a continuance to Monday.

The trial court stated he saw a stitched laceration on his left cheek "running from corner of left eye orbit down his . . . cheek toward the left corner of his mouth." It appears from the record Carden's wrist laceration was visible only if he pulled up his shirt sleeve. The court explained Carden was released from the hospital and he appeared capable of participating in trial. Defense counsel argued Carden was released from the hospital just hours earlier, and he was tired and did not feel well. Counsel again requested a three-day continuance to Monday to allow his injuries "to heal a little bit." Counsel said he understood if the court denied his request, in which case counsel requested the court instruct the jury Carden was assaulted so the jury does not infer he assaulted someone.

The court stated it was more inclined to instruct the jury Carden's appearance was not in evidence and the jury could not draw any inferences from his appearance. The court stated it could not advise the jury Carden was assaulted because it did not know how Carden was injured. Defense counsel replied Carden's appearance was at issue and because this was an assault trial, the jury could infer from his injuries Carden is a violent person who gets into a lot of fights. The court indicated Carden's injury would be visible for at least one week and the scar may be visible indefinitely, and therefore, a three-day continuance would not solve the problem. Sloan's counsel agreed with Carden's counsel.

The prosecutor contended a three-day continuance would not be beneficial because Carden will still have the scar and the bruises might get worse. The prosecutor suggested the court instruct the jury to not draw any inference from Carden's appearance.

The court stated it was about the same distance from Carden as the jury was and it could not see any bruises. The court added the stitched, visible laceration was not

"grotesque or the kind of injury that [would] elicit an emotional response from someone looking at it." The court was concerned that if it told the jury Carden was assaulted, the jury could infer he provoked or insulted someone. The court repeated it was inclined to instruct the jury to not draw any inferences from Carden's appearance. The court concluded there was no good cause to continue the case and denied Carden's motion.

Defense counsel requested photographs be taken of Carden's injuries. Counsel stated the jury will pass within six feet of Carden, and he is in pain and is emotionally upset, and he cannot concentrate. Counsel claimed Carden was not present for purposes of the Sixth Amendment. The court stated it observed counsel's interaction with his client and it did not see any basis for drawing the conclusions counsel reached. The court allowed photographs to be taken, and denied Carden's motions.

When trial resumed, the court stated: "Ladies and gentlemen . . . [¶] [y]ou may have noticed as you came in this morning . . . Carden has an injury to his left cheek. I need to give you some instructions in that regard. First of all, you're not to speculate regarding how he received that injury. Okay. And one reason why you shouldn't speculate is because you're as likely to be wrong as you are right. Speculation is just that. And that is why in this case I tell you not to speculate. [¶] You're going to decide the case based on the evidence. It is a very important principle of law that we make important decisions in the court not based on speculation, conjecture, [or] guess[work]. We make it based on evidence and the rational application of the law and our reason to that evidence. That is the first reason. [¶] The second reason is even if you were to speculate correctly, it would be irrelevant. It is not evidence in this case. The circumstances under which he suffered that injury are irrelevant to your decision making. Okay. And I know you've been at this long enough and been working hard enough to appreciate how important it is that we make a decision in this case based solely on the evidence that you've received in the case, and that I've admitted into the case. [¶] Okay.

I think you all understand that. I see some acknowledgment in the form of nods and gestures that you fully appreciate that instruction."

Later that morning, Carden's defense counsel renewed his continuance motion. Counsel stated Carden lost a lot of blood, had not eaten, had an untreated human bite wound on his back, and was unable to continue. The court stated that throughout the morning, it had observed Carden and he did not appear to be incapacitated. It said Carden took notes, paid attention, and communicated with his defense counsel. The court again denied the continuance motion.

Before the noon recess, Carden's defense counsel stated Carden wanted to be present for the afternoon discussion on jury instruction, but he was not feeling well and he needed to lie down. The court found no evidence Carden was unable to be present and he voluntarily absented himself from the proceedings.

On Monday, Carden's defense counsel moved for a mistrial. Counsel argued that during a power outage, the bailiff shone his flashlight on Carden, as he was trained to do, and this highlighted Carden's dangerousness because of his injuries. Counsel also renewed his arguments from Thursday. After the trial court denied the motions, the prosecutor stated Carden's injuries were just as visible on Monday as they were on Thursday. The court stated the laceration was "fairly prominent" but it was not as red as the prior week. The court reasoned there was insufficient evidence Carden was unable to participate in the proceedings.

On surrebuttal, Carden offered Sloan's father's testimony. Dwight Sloan (Dwight) testified that if Sloan had told his mother Carden had stabbed people immediately after the attacks, she would have told him. On cross-examination, the prosecutor asked Dwight whether Sloan had ever told him he was afraid of Carden. Sloan's defense counsel objected on the grounds it was beyond the scope of direct examination, and the trial court granted the prosecutor's request to reopen. Dwight replied, "No," and the prosecutor asked what he meant when he told his investigator and

Carden's defense counsel, "'We have got a young man in there everybody involved or around it is scared of'? And you said, 'Inside that guy has got clout,' what did you mean by that?" Carden's defense counsel objected on the grounds the prosecutor committed misconduct and moved for a mistrial. The trial court sustained the objection on Evidence Code section 352 grounds and denied the mistrial motion.

The jury convicted Carden on all counts and found true all the enhancements.

Phase II

Before trial, Sloan moved to exclude admission of the prosecutor's gang expert's testimony. Carden joined in that motion. The trial court granted the motion concluding the expert was not qualified or credible.

At trial, to establish the criminal street gang allegations, the prosecutor offered the following evidence of WC's crimes:

In July 2001, a detective testified someone had written "WCK" on a fence and "WC" on the sidewalk in the Orangecrest area of Riverside.

In September 2002, Carden and another young man entered a Circle K in Woodcrest and grabbed a couple packs of cigarettes and a 12-pack of beer. When the manager asked them to pay, they yelled obscenities at him. They said, "'Fuck you[.]' [W]e don't have to do what you say. This is our town.'" The manager called the police. They cussed at the manager and the clerk, who locked Carden outside and his friend inside. The friend punched the glass door and Carden kicked the glass door allowing his friend to escape.

A few days later, Carden stole a pack of cigarettes from a Stater Bros. supermarket in Woodcrest. The manager chased Carden and told him to return to the store to be arrested for shoplifting. Carden responded, "'Fuck that.'" Carden got into the passenger side of a white Chevrolet S10 truck, and the driver drove over the manager's

foot. The manager saw Carden steal cigarettes on previous occasions. The parties stipulated the manager had a lengthy criminal record.

The following month, Carden and McDaniel stole a DVD player from Sears. An officer responded to a shoplifting call and detained Carden, McDaniel, and a third man leaving the parking lot in a car.

In January 2003, two men stole beer from a Ralph's supermarket. At trial, the security guard who responded to the shoplifting call identified Sloan as one of the men. When Sloan blurted out, "Me?" the security guard replied, "That's not him, then. I made a mistake."

In July 2004, Carden walked into a local supermarket, and the supervisor recognized and asked him if he was there to steal again. Carden punched him and ran away to a waiting car. He stole cigarettes and a telephone calling card.

In August 2004, Rochlin, Hudson, Walker, and a fourth man walked into an extreme sports store in Orangecrest, near Romano's. The store employee recognized the men, and while Rochlin distracted the employee, Hudson and Walker stole clothes, while the fourth man stole two skateboard decks. The value of the clothing alone was about $400.

In January 2005, Noel Padilla, driving his new car, was at a fast-food restaurant in Orangecrest. Either Sloan or his friend threw a bottle at Padilla's car. When Padilla asked them why they did it, Sloan punched him in the face, and his friend kicked the car. Padilla sped away.

In April 2005, Jonathan Alexander was at a house party when he saw a group of young Caucasian males steal a keg of beer from the party and take it to a truck parked on the street. He recognized one of the men as "Little Mikey." He and another man rescued the keg from the truck. An hour or two later, the beer thieves and their posse totaling 15 to 20 young men congregated at the party. While Alexander was talking with someone, someone hit him with a bat from behind, spinning him around. As

he spun around, someone hit him with a whiskey bottle, breaking it. Alexander fled and the mob chased him. When they caught him, someone stabbed Alexander in the throat with the whiskey bottle, and the other men beat him. The men yelled, "Dub-C" and one of the men barked and claimed he was the leader. There was evidence Lovell was one of the attackers.

In April and May 2005, the City of Riverside cleaned approximately 40 sites with WC or WCK graffiti. Three of those sites required more than $400 to clean.

In early September 2005, Sean Bessert, Little Mikey Luce, and one or two other young men attacked Michael Salvato-Bodewin's cousin. Salvato-Bodewin sprayed pepper spray at the men, and they fled. A week later, Bessert slapped Salvato-Bodewin's hat at a local shopping mall. Days later, Salvato-Bodewin was at a fast-food restaurant with his mother. As they were getting into his truck, Bessert chased the truck and said, "'I'm going to fucking kill you and slit your throat, mother fucker.'" Bessert was with eight to 12 young Caucasian men; one of the men had a chain. Salvato-Bodewin, fearing for their lives, tried to drive away, and Bessert kicked his truck. The men circled his truck, and punched and threw objects at the truck. They yelled, "'We're going to kill you. Fuck that bitch in the car.'" Bessert tried to open the truck's doors, and the other men banged on the windows and threw things at the truck. A week later, Salvato-Bodewin was driving when he saw Bessert lean out the window of another car, and yell, "'I'm going to slit your throat. Dub-C, Dub-C.'"

In October 2005, Lovell spray painted the words "'WC Havoc'" on the sidewalk across the street from his home. When a police officer ordered Lovell to stop, he ran inside his home. In his bedroom, WC and WCK were written on a television set and computer monitor.

The parties stipulated to the following: Walker was convicted of felony assault by means of force likely to cause great bodily injury for an offense in April 2003;

and Lovell suffered a true finding for battery with serious bodily injury on Alexander for an offense in April 2005.

The parties also stipulated Carden was convicted of the following offenses: commercial burglary (Circle K-September 3, 2002); felony vandalism (Circle K-September 3, 2002); commercial burglary (Stater Bros.-September 6, 2002); commercial burglary (Sears-October 1, 2002); commercial burglary (Stater Bros.-August 2002); and grand theft from person (El Toro Market-July 2, 2004). The parties also stipulated Carden was in custody from July 2, 2004, to January 8, 2006.

Sloan offered Smith's testimony. Smith admitted there was a group of young men who lived in Woodcrest, socialized with each other, and called the group WC, WCK, Dub-C, or Woodcrest. He claimed they were a party krew. He explained a party krew is a group of friends who meet on the weekends and have parties or go to parties together. Smith stated they did not gather to commit crimes, and their primary focus was drinking and having fun. Smith said he did not intend to fight at these parties, but there were usually fights. Smith claimed he did not participate in felony gang crimes, but admitted he knew others did. He claimed the "K" in WCK stands for krew, not killer.

At the bifurcated trial, the jury convicted Carden of count 4 and found true the street terrorism enhancements.

The trial court found he served a prior prison term. The court sentenced Carden to 15 years to life on count 1, three years for the great bodily injury enhancement, one year for the personal use of a dangerous and deadly weapon enhancement, and one year for the prior prison term.

DISCUSSION

I. Sufficiency of the Evidence

A. Attempted Murder

Carden argues insufficient evidence supports his convictions for three counts of attempted murder because the accomplice testimony was not corroborated and there was no evidence of premeditation and deliberation. Neither contention has merit.

"In reviewing a sufficiency of evidence claim, the reviewing court's role is a limited one. '"The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]"' [Citations.] [¶] "'Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder. [Citations.]" [Citation.]' [Citation.]" (*People v. Smith* (2005) 37 Cal.4th 733, 738-739 (*Smith*).)

1. Corroboration Accomplice Testimony

Carden complains there was insufficient evidence corroborating Smith's accomplice testimony. Instead of refuting the potentially corroborating evidence, he complains Smith's testimony was contradictory, lacked credibility, and was biased. He also relies on defense counsel's arguments at the hearing on his section 1118.1 motion for acquittal without making any new arguments to support his claim. His claim is unpersuasive.

"The law requiring corroboration of accomplice testimony is well established. 'A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. . . .' (§ 1111.) '"The requisite corroboration may be established entirely by circumstantial evidence. [Citations.] Such evidence 'may be slight and entitled to little consideration when standing alone. [Citations.]'"' [Citations.] '"Corroborating evidence 'must tend to implicate the defendant and therefore must relate to some act or fact which is an element of the crime but it is not necessary that the corroborative evidence be sufficient in itself to establish every element of the offense charged.' [Citation.]"' [Citations.] In this regard, 'the prosecution must produce independent evidence which, without aid or assistance from the testimony of the accomplice, tends to connect the defendant with the crime charged. [Citation.]' [Citation.] '"Corroborating evidence is sufficient if it substantiates enough of the accomplice's testimony to establish his credibility [citation omitted]."' [Citation.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1128.) "A defendant's own testimony may be sufficient corroborative testimony, and false or misleading statements made to authorities may constitute corroborating evidence. [Citations]" (*People v. Vu* (2006) 143 Cal.App.4th 1009, 1022-1023 (*Vu*).)

The corroborating evidence here meets that standard. There was evidence Rizk, Rochlin, and Zech all placed Carden at Romano's the night of the attack. Zech testified that after Carden got off the telephone, Carden told Smith that McDaniel and his girlfriend were in trouble and McDaniel wanted their help. Zech stated Smith told her that he was leaving to help McDaniel. Zech admitted the group was going to the party "to go fight somebody." Zech's testimony established Carden's motive in going to the party (to assist McDaniel by fighting his foes), and that he planned his attack (by

gathering his loyal and trusted friends). This independent evidence connected Carden to the crime by establishing a motive and planning activity.

Additionally, Carden's statements to Cobb provided corroborating evidence linking him to the crime. When Cobb asked Carden about his whereabouts on St. Patrick's Day, Carden claimed he was with Freeman at a friend's house, and he was not out at any restaurants or bars. Further, he denied being at the party. Clearly this is misleading as three people placed Carden at Romano's where he stated he was going to a party to help McDaniel. And Freeman testified she did not meet Carden until after St. Patrick's Day. A defendant's "misleading statements made to authorities may constitute corroborating evidence. [Citations.]" (*Vu, supra,* 143 Cal.App.4th at pp. 1022-1023.) This independent evidence linked Carden to the crime and allowed the jury to rely on Smith's accomplice testimony to convict Carden of counts 1, 2, and 3.

Smith testified Carden was one of the attackers, and that when they returned to McDaniel's house, Carden admitted stabbing three or four people. Additionally, although they both denied it at trial, there was evidence that when Sloan returned home from the attack, he told his mother "Carden wigged out and stabbed someone." Therefore, there was sufficient corroborating evidence linking Carden to the crime and sufficient evidence supporting his convictions on counts 1, 2, and 3.

2. Premeditation, Deliberation, and Willfulness

Carden claims there was no evidence the attempted murders were committed with premeditation, deliberation, and willfulness because there was no evidence of planning, motive, or the manner of the attempted killing. We disagree.

"'Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing.' [Citations.]" (*Smith, supra,* 37 Cal.4th at p. 739.) To be guilty of attempted murder, the evidence must establish that defendant harbored express malice toward the victim. (*Ibid*.) "Express malice requires a showing that the assailant """"either desire[s] the result [i.e., death] or

know[s], to a substantial certainty, that the result will occur.' [Citation.]"' [Citations.]" (*Ibid.*) A willful, deliberate, and premeditated attempted murder is an attempted murder that is intentional, considered beforehand, and the "result of careful thought and weighing of considerations for and against the proposed course of action." (*People v. Perez* (1992) 2 Cal.4th 1117, 1123 (*Perez*).) "'Premeditation and deliberation can occur in a brief interval. "The test is not time, but reflection. 'Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly.'"' [Citation.]" (*People v. Sanchez* (2001) 26 Cal.4th 834, 849.) Factors that may establish premeditation and deliberation include planning activity, motive, and the manner of the attempted killing. (*Perez, supra,* 2 Cal.4th at p. 1125.)

Here, there was sufficient evidence of motive, planning, and the manner of attack to support the jury's finding Carden committed counts 1, 2, and 3 with premeditation, deliberation, and willfulness. The evidence demonstrated the motive for Carden and his posse leaving Romano's and going to the party was to fight those people who were bothering McDaniel and his girlfriend. Simply put, Carden's motive was to back up his friend. And there was evidence from which the jury could reasonably infer Carden planned the attack. When his telephone call ended, he told Smith that McDaniel needed their assistance and he gathered his closest associates to go to the party to fight those people who were bothering McDaniel and his girlfriend. To gather his friends and take them to the party suggests Carden thought that it would be better to take his friends to the fight rather than go it alone. Additionally, there was evidence that when they attacked Manning, Raymond, Rhodes, and Ramaker without provocation, they concealed their identities with bandanas and sweatshirts supporting the conclusion they planned the attack. Moreover, Carden's arming himself with a stabbing instrument also indicates he planned the attack. (*People v. Sanchez* (1995) 12 Cal.4th 1, 34-35 [defendant arming himself with curved metal bar shows planning], overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22 (*Doolin*).) Finally, there was evidence the

manner of the attack was particularly brutal. Manning was stabbed twice, Rhodes was stabbed four times, and Raymond was stabbed six times, and all were punched and kicked. Raymond required open heart surgery to repair his life-threatening injuries. The manner of the stabbings could have easily led the jury to infer premeditation and deliberation. (*Perez*, *supra*, 2 Cal.4th at p. 1126.) Therefore, based on evidence Carden had a motive to attack the unsuspecting group, the fact he planned the attack, and the manner of the attack, we conclude there was sufficient evidence of premeditation, deliberation, and willfulness.

B. Street Terrorism

Carden contends insufficient evidence supports his conviction on the substantive offense of street terrorism, count 4, and the jury's true finding on the street terrorism enhancements as to the other counts. Neither of his contentions have merit.

1. Substantive Offense

Carden claims there was insufficient evidence he was an active participant in a criminal street gang. Not so.

Section 186.22, subdivision (a), the street terrorism substantive offense, states: "Any person who *actively participates in any criminal street gang* with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished . . . in the state prison for 16 months, or two or three years." (Italics added.)

"[A]ctive participation is 'involvement with a criminal street gang that is more than nominal or passive.' [Citation.] It is not enough that a defendant have actively participated in a criminal street gang at any point in time, however. A defendant's active participation must be shown at or reasonably near the time of the crime." (*People v. Garcia* (2007) 153 Cal.App.4th 1499, 1509.)

Section 186.22, subdivision (f), as relevant here, states, "'criminal street gang' means any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in" section 186.22, subdivision (e)(1) through (25), or (31) through (33).

Here, there was sufficient evidence Carden actively participated in WCK at the time of the offenses in March 2006. In July 2004, Carden claimed he was a member of WCK, and he had WC tattooed on his chest. Although Smith testified WCK was just a party krew, he stated Carden, Sloan, Umbarger, Rizk, and Hudson were all part of Dub-C. Upon being released from custody in January 2006, Carden resumed associating with fellow WCK gang members. With respect to the attack, as we explain above, after learning his friend needed help, Carden gathered his associates and led them to the party to fight those who were bothering McDaniel and his girlfriend. Sloan, Umbarger, Smith, Hudson, Bessert, and Rochlin followed Carden to the party, and as they attacked the unsuspecting men, they yelled, "'Dub-C, mother fuckers[.]'" This was sufficient evidence for the jury to reasonably infer Carden was a member of WCK at the time of the attack. (*People v. Williams* (2009) 170 Cal.App.4th 587, 626 [sufficient evidence defendant active participant criminal street gang based on leadership position, tattoo, presence with other gang members, and prior admissions].) We must now address what appears to be Carden's only other contention with respect to count 4—there was insufficient evidence WCK was a criminal street gang because there was no evidence of WCK's primary activities.

The jury was instructed that to convict Carden of count 4, it had to conclude, among other things not disputed on appeal, that WCK's primary activities were one or more of the following: attempted murder; assault with a deadly weapon or with force likely to produce great bodily injury; burglary; robbery; grand theft; and criminal threats.

Smith testified WCK formed in 2000 or 2001, and as we explain above, there was sufficient evidence Carden, Sloan, Umbarger, Rizk, Hudson, and Walker were all members of WCK. The parties stipulated Carden was convicted of four counts of commercial burglary, and one count of grand theft from September 2002 through July 2004.

There was evidence that in August 2004, Walker, a WCK founder, Hudson, a WCK member, and Rochlin, a long time friend, burglarized an extreme sports store. They stole clothes and equipment worth over $400. There was evidence that in April 2005, Lovell, a WCK member, and others stole a keg of beer from a house party, and after Alexander retrieved the keg, Lovell and other assaulted Alexander with a deadly weapon (a bat and a whiskey bottle) as they yelled, "Dub-C." The wound to Alexander's neck was two millimeters from his carotid artery and was nearly fatal. Finally, here, there was evidence Carden and his posse attacked Manning, Raymond, Rhodes, and Ramaker with deadly weapons nearly killing them. Based on all this evidence, we conclude the jury could reasonably infer WCK's primary activities were burglary, assault with a deadly weapon, and attempted murder. (§ 186.22, subd. (e)(1), (3) & (11).)

2. Enhancements

Carden claims there was insufficient evidence supporting the street terrorism enhancements because there was no evidence he was an active participant in a criminal street gang who committed the offenses to benefit a criminal street gang. Again, we disagree.

The street terrorism enhancement, section 186.22, subdivision (b)(1), increases the punishment for "any person who is convicted of a felony committed *for the benefit of, at the direction of, or in association with any criminal street gang*, with the specific intent to promote, further, or assist in any criminal conduct by gang members . . . ." (Italics added.)

Here, moments before Carden and his confederates nearly killed Manning, Raymond, and Rhodes, they asked the men if they were "DC" and yelled, "'Dub-C, mother fuckers[.]'" Carden and his posse inquired whether the men were from another gang, and then claimed their gang before attacking the defenseless victims. From this evidence, the jury could reasonably infer Carden committed counts 1 through 3 and 5 through 7 for the benefit of a criminal street gang.

II. Motion for Continuance and Mistrial

Carden argues the trial court erroneously denied his continuance and mistrial motions because a stitched laceration on his face prejudiced him before the jury. His claims are meritless.

"A continuance will be granted for good cause [citation], and the trial court has broad discretion to grant or deny the request. [Citations.] In determining whether a denial was so arbitrary as to deny due process, the appellate court looks to the circumstances of each case and to the reasons presented for the request. [Citations.] One factor to consider is whether a continuance would be useful. [Citation.]" (*People v. Frye* (1998) 18 Cal.4th 894, 1012-1013 (*Frye*), overruled on other grounds in *Doolin, supra,* 45 Cal.4th at p. 421, fn. 22.)

"A trial court should grant a motion for mistrial 'only when "'a party's chances of receiving a fair trial have been irreparably damaged"'" [citation], that is, if it is 'apprised of prejudice that it judges incurable by admonition or instruction' [citation]. 'Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions.' [Citation.] Accordingly, we review a trial court's ruling on a motion for mistrial for abuse of discretion. [Citation.]" (*People v. Avila* (2006) 38 Cal.4th 491, 573.)

Here, the trial court properly denied Carden's continuance motions because he did not demonstrate good cause for a continuance. Because the trial court exhibits

were not forwarded to us, we are limited to the reporter's transcripts. It appears the only injury visible to the jury was the stitched laceration on Carden's face. The trial court characterized the laceration as prominent but not grotesque. As expected, the laceration was as visible on Monday as it had been on Thursday. A three-day continuance would not have minimized the impact of the laceration as the laceration was still visible on Monday. It would have been imprudent for the court to continue the trial indefinitely to wait for Carden's injury to completely heal. And the trial court instructed the jury, thoroughly, that it could not draw any references from Carden's appearance as it was not evidence, and it was required to decide the case based on the evidence before it. We presume jurors are intelligent people capable of understanding the instructions and applying them to the facts of the case. (*People v. Carey* (2007) 41 Cal.4th 109, 130.)

Further, the record demonstrates Carden's Sixth Amendment rights were not implicated. The court explained that during the morning proceedings it had observed Carden, and he meaningfully participated in the proceedings. The court explained Carden took notes, paid attention, and communicated with his defense counsel. Later, when Carden voluntarily absented himself from the afternoon proceedings, the court explained there was no evidence Carden could not participate as he had participated meaningfully in the morning proceedings. Based on a cold reading of the transcript, it appears Carden was able to meaningfully participate in the proceedings and with respect to the afternoon session, simply chose not to be there. We conclude his Sixth Amendment rights were not implicated.

Finally, the trial court properly denied Carden's mistrial motion because his right to receive a fair trial was not irreparably damaged. The fact the bailiff shone his flashlight on Carden when the lights went out does not persuade us otherwise. As we explain above, the trial court instructed the jury to not speculate as to how Carden was injured or consider his appearance in any way. We cannot believe that upon witnessing

the bailiff illuminate Carden with a flashlight intelligent jurors would be transformed into petrified spectators as if they were watching "The Shining."

III. Prosecutorial Misconduct

Carden argues the prosecutor committed misconduct during his examination of Dwight and during closing argument. We will address his contentions in turn.

"'A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct, and such actions require reversal under the federal Constitution when they infect the trial with such "'unfairness as to make the resulting conviction a denial of due process.'" [Citations.] Under state law, a prosecutor who uses such methods commits misconduct even when those actions do not result in a fundamentally unfair trial. [Citation.]'" (*People v. Parson* (2008) 44 Cal.4th 332, 359.)

"To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we 'do not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements. [Citation.]" (*Frye, supra,* 18 Cal.4th at p. 970, disapproved on other grounds in *Doolin, supra,* 45 Cal.4th at p. 421, fn. 22.)

A. Examination of Dwight

Carden asserts the prosecutor committed misconduct during his examination of Dwight when he asked him whether he said, "'Inside that guy has got clout,' what did you mean by that?" The prosecutor did not commit misconduct. From the order of questions, it was clear the prosecutor was referring to Carden. The question preceding this question was whether Sloan told his father he was afraid of Carden. But there was evidence at trial demonstrating Carden was in custody and he was feared. Smith testified that when he and Carden were being transported to court, Carden told him

to "keep [his] mouth shut." And there was evidence Carden called Freemen from jail. Further, there was testimony Smith, Rizk, and Ramaker all feared Carden and Sloan. Without deciding whether this inquiry was wise or necessary, it was not misconduct.

Assuming the prosecutor did commit misconduct, Carden was not prejudiced. The trial court instructed the jury the attorneys' questions are not evidence (CALCRIM No. 222), and the fact Carden was in custody during trial was not evidence of his guilt (CALCRIM No. 220). More importantly, as we explain above, there was substantial evidence of Carden's guilt on all counts.

B. Closing Argument

Carden contends the prosecutor committed misconduct during closing argument when he maligned him, defense counsel, and the credibility of his defense. As we explain below, the prosecutor did not commit misconduct during closing argument.

"Regarding the scope of permissible prosecutorial argument, [our Supreme Court has] noted '"'a prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.] It is also clear that counsel during summation may state matters not in evidence, but which are common knowledge or are illustrations drawn from common experience, history or literature.' [Citation.] 'A prosecutor may "vigorously argue his [or her] case and is not limited to 'Chesterfieldian politeness'" [citation], and he [or she] may "use appropriate epithets . . . ."'" [Citation.]' [Citation.]" (*People v. Hill* (1998) 17 Cal.4th 800, 819 (*Hill*).) However, "[a] prosecutor commits misconduct if he or she attacks the integrity of defense counsel, or casts aspersions on defense counsel. [Citations.] 'An attack on the defendant's attorney can be seriously prejudicial as an attack on the defendant himself, and, in view of the accepted doctrines of legal ethics and decorum [citation], it is never excusable.' [Citation.]" (*Id.* at p. 832.)

"To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we 'do not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements. [Citation.]" (*Frye, supra,* 18 Cal.4th at p. 970.)

Carden cites to numerous instances of alleged prosecutorial misconduct during closing argument. We will recite each instance of alleged misconduct and explain why Carden's claims are meritless.

During closing argument, the prosecutor stated: "It also helps to explain why . . . Smith and . . . Sloan are minimizing the conduct of the others including . . . Carden. It also helps to explain why some witnesses demonstrated that they're afraid." The trial court overruled Carden's defense counsel's objection.

The prosecutor did not malign Carden. The prosecutor may fairly comment on the evidence during closing argument. As we explain above, there was evidence Ramaker, Rizk, and Smith feared Carden. This was a permissible argument on the evidence.

A little later, the prosecutor added: "Folks, it is not my first option or my first choice. It is not the first choice of the district attorney's office to have to roll people, we call it, or have people turn state's evidence. We would rather prove a case without needing to rely on any defendant in the case." The court sustained Carden's defense counsel's objection and admonished the prosecutor to not comment on his own motivation.

The purpose of closing argument is for counsel to argue the evidence presented during the trial and argue the inferences or conclusions that the jury should draw after applying the law to the evidence. It is not for counsel to comment on his or her personal motivations. The trial court sustained Carden's defense counsel's objection

and advised the jury of such. We conclude, however, it is not reasonably likely the jury would apply the prosecutor's desires in an erroneous manner. Contrary to Carden's assertion, the prosecutor's statement did not malign him, his defense counsel, or his defense. The remainder of the prosecutor's allegedly objectionable statements are from his rebuttal argument.

First, the prosecutor argued: "You won't be doing our side any favor either by just coming back on lessers. That would be an insult to the victims and to the case." The court overruled Carden's defense counsel's objection.

The prosecutor did not malign Carden, his defense counsel, or his defense. If anything, the prosecutor appealed to the jury's sympathy. "'[I]solated, brief references to retribution or community vengeance such as occurred here, although potentially inflammatory, do not constitute misconduct so long as such arguments do not form the principal basis for advocating the imposition of the death penalty.' [Citation.]" (*People v. Sanders* (1995) 11 Cal.4th 475, 550, fn. 33.) Here, it is not reasonably likely the jury would rely on the prosecutor's brief, isolated statement to convict Carden. The prosecutor's statement although unnecessary was not misconduct.

A little later, the prosecutor added: "We mentioned the elements yesterday, and if you're going to accept accomplice testimony such as . . . Smith['s], one of the requirements is that that supporting evidence tends to connect the defendant to the commission of the crime. [¶] [Carden's defense counsel] tried to cloud that element by adding another word. He wanted to add the word 'crime scene.'" When Carden's defense counsel objected on the grounds the prosecutor misstated his argument, the court admonished the jury they had to rely on their memories of counsel's argument.

Although a prosecutor may not strike foul blows (*In re Sakarias* (2005) 35 Cal.4th 140, 159), it is not misconduct to urge the jury not to be misled by defense counsel's argument (*People v. Cummings* (1993) 4 Cal.4th 1233, 1302 (*Cummings*)). Here, the prosecutor was simply telling the jury to focus on the jury instructions and not

be misled by Carden's defense counsel's argument. The prosecutor was not attacking defense counsel's integrity, and therefore, this was not misconduct.

The prosecutor added: "[Carden's defense counsel] said toward the end of his argument yesterday, we don't need to talk about . . . Sloan. His attorney will talk about his statement. [¶] Well, that is convenient. Why did we just completely ignore this evidence, don't even comment on it." The court sustained Carden's defense counsel's objection and told the prosecutor to discuss the facts and not opposing counsel's argument.

Again, the prosecutor does not commit misconduct when she urges the jury not to be misled by defense counsel's characterization of the evidence. (*Cummings, supra,* 4 Cal.4th at p. 1302.) Here, the prosecutor was commenting Carden's defense counsel ignored Sloan's testimony because it was incriminating. The prosecutor was permitted to comment on Carden's defense counsel's characterization of the evidence during closing argument. "Arguments by the prosecutor that otherwise might be deemed improper do not constitute misconduct if they fall within the proper limits of rebuttal to the arguments of defense counsel. [Citation.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1026.)

The prosecutor continued: "The defense also didn't explain why he was angry at . . . Freeman for blowing his cover about not being at Romano's. There is only one reasonable explanation. The defense gave you none. He gave you no reasonable explanation why Carden would deny being at Romano's and upset [Freeman] couldn't cover for him and keep him out of Romano's either. He never explained why." The court again sustained Carden's defense counsel's objection and again reminded the prosecutor to focus on the facts and not opposing counsel's argument. The prosecutor persisted: "There is a reasonable explanation why. [Carden] denied being at Romano's and he was mad . . . Freeman wouldn't cover for him and was going to blow his cover. It is because he did the stabbings and is trying to cover his tracks. It is interesting too the

defense is willing to put . . . Carden at Romano's and say that there [are] 300 people there. Yet they can't find one witness, not even one, to say [Carden] stayed behind at Romano's after everybody left. [¶] Listen to . . . Carden's interview again if you have to. Listen to his smug attitude until the police start getting close to home. There is no remorse, no regret, not an inch of remorse or regret." The court overruled Carden's defense counsel's objection.

A prosecutor may comment on the state of the evidence and defendant's failure to introduce material evidence or call logical witnesses. (*People v. Cook* (2006) 39 Cal.4th 566, 608.) Here, the prosecutor was not maligning defense counsel or Carden's defense. The prosecutor was stressing that Carden failed to present evidence supporting his defense. This was permissible and was not misconduct.

Finally, the prosecutor then discussed the concept of circumstantial evidence: "A couple of things to mention about that. Number one, you don't look at each piece of circumstantial evidence by itself. You look at it all together. It is just like on drunk driving cases. One of the classic tricks in the defense work." The trial court sustained Carden's defense counsel's objection and admonished the prosecutor to not characterize the defense bar or comment on irrelevant cases.

Although it is misconduct to attack the defendant's attorney personally (*Hill, supra,* 17 Cal.4th at p. 832) personally, including challenging the attorney's personal honesty (see *People v. Bemore* (2000) 22 Cal.4th 809, 846), it is not misconduct to disparage the merits of the defense or artful tactics used to make the defense seem stronger than it is. (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1154-1155, disapproved on other grounds in *Doolin, supra,* 45 Cal.4th at p. 421, fn. 22.) Here again, the prosecutor was not attacking Carden's defense counsel's integrity. The prosecutor was urging the jury to not be misled by defense counsel's argument. Although the prosecutor's reference to drunk driving cases is curious considering this was an assault case, we cannot conclude it was reasonably likely the jury would rely on the prosecutor's

statement to convict Carden. Therefore, we conclude the prosecutor did not commit misconduct.

IV. CALCRIM No. 372

Carden argues the trial court erroneously instructed the jury with CALCRIM No. 372, "Defendant's Flight" because there was insufficient evidence he fled. Carden claims that because he was on parole and had not been charged, it was too speculative to infer he fled because he was a suspect. Not so.

"In general, a flight instruction 'is proper where the evidence shows that the defendant departed the crime scene under circumstances suggesting that his movement was motivated by a consciousness of guilt.' [Citations.] '"[F]light requires neither the physical act of running nor the reaching of a far-away haven. [Citation.] Flight manifestly does require, however, a purpose to avoid being observed or arrested."' [Citations.]" (*People v. Bradford* (1997) 14 Cal.4th 1005, 1055.)

The trial court instructed the jury with CALCRIM No. 372 as follows: "If [Carden] or . . . Smith fled or tried to flee immediately after the crime was committed or after he was accused of committing the crime, that conduct may show that he was aware of his guilt. If you conclude that [Carden] or . . . Smith fled or tried to flee, it is up to you to decide the meaning and importance of that conduct. However, evidence that [Carden] fled or tried to flee cannot prove guilt by itself."

Here, the evidence at trial established the following: the attack occurred on March 17 or 18, 2006; Smith was arrested on March 23, 2006; and by April 3, 2006, Smith's investigator's were interviewing his friends. On April 4, Bellmeyer pulled over Carden, and before he could arrest him, Carden fled. From this evidence, the jury could reasonably infer Carden knew he was a suspect, and he fled to avoid being arrested. Therefore, there was sufficient evidence from which the jury could infer Carden was fleeing because he had a guilty conscious.

CALCRIM No. 372 "did not assume that flight was established, leaving that factual determination and its significance to the jury." (*People v. Abilez* (2007) 41 Cal.4th 472, 522.) Further, the flight instruction benefited Carden because it told the jury it could not convict him based solely on the fact he fled if the jury so found. (*Ibid*.) If the jury determined this evidence was of no probative value, the instruction stated the jury was free to give this evidence any or no weight in its deliberations.

V. Cumulative Error

Carden claims the cumulative effect of the errors requires reversal. We have concluded there were no errors, and therefore, his claim has no merit.

DISPOSITION

The judgment is affirmed.

O'LEARY, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

IKOLA, J.